Bearing in mind section 48 of the Road Traffic Enactment and section 8 (iii) of the Interpretation and General Clauses Enactment (Chapter 1) there can be no doubt to my mind that rule 56 is *intra vires* the Enactment.

Coming now to the first proposition I have enunciated above the learned Magistrate has said—

> "A glance at section 118 (1) (d) of Enactment 17/1937 (the Road Traffic Enactment) might suggest that this (i.e. the fact that there is no power given to the High Commissioner to prescribe a penalty in the Rules and that it is nowhere laid down in the Enactment that a breach of Part III. of the Motor Vehicles (Construction and Use) Rules, 1937, is an offence) may be inferred but it is submitted that a careful study of its wording reveals that this is not so. The section states:—
>
> A person who—
>
> (d) without lawful excuse acts in contravention of or fails to comply with any provision of this Enactment or of any rule made thereunder;
>
> shall be liable where no special penalty is provided in the case of the first offence etc.
>
> In other words it refers only to that class of rule where no special penalty is provided and does not refer to rules in which a penalty is provided nor do I think can it be held to make a contravention of such rules an offence, even by implication."

With some of the remarks of the learned Magistrate on his construction of section 118 (1) (d) I respectfully agree but with others I do not.

To my mind section 118 (1) (d) does, in the clearest terms, two things. Firstly it creates an offence to contravene any provision of the Enactment or of any rule and secondly it provides a penalty for such an offence where no special penalty is provided.

It creates the offence because it says—

> "A person who—
>
> (d) ....acts in contravention of....any rule ....shall be liable...."

That, to my mind, means and can only mean that it is an offence to act in contravention of any rule.

It also provides a penalty for any offence where no special penalty is provided for that offence because of the words "where no special penalty is provided" contained in it. So that in this case if rule 80 is *intra vires* the penalty clause in this section will not apply.

I now come to the second proposition that the Enactment nowhere empowers the High Commissioner to impose a penalty for a breach of any rule contained in Part III. of the Motor Vehicles (Construction and Use) Rules, 1937, and in the absence of such specific power rule 80 thereof may possibly be *ultra vires*.

I hold that rule 80 is not *ultra vires* the Enactment on account of the absence of specific power given to the High Commissioner to impose a penalty because, on principle, an Act which authorises the making of by-laws impliedly authorises the annexation of a reasonable penalty for their infringement. In *Hall v. Nixon*, L.R. 10 Q.B. 152, Lush J. said at page 159:—

> "Mr. Herschell contended that there was no power to impose a penalty. But a by-law could only be enforced in this way. In 2 Kyd on Corporations, page 156, it is said: 'To secure obedience to a by-law, it is necessary that a penalty of some kind should be annexed to the breach of it, for otherwise the by-law will be nugatory....'
>
> ....but, by necessary implication, a power to make a by-law implies the power of enforcing it by pecuniary penalty."

For these reasons I think the conviction in this case is sound.

Conviction Confirmed.

[APPELLATE CIVIL JURISDICTION)

TERREL, Ag. C.J., McELWAINE, C.J. (S.S.)

AND GORDON-SMITH, J.

SELVADURAY vs. CHINNIAH.

(SELANGOR CIVIL APPEAL No. 2 of 1938)

Evidence Enactment Sections 102, 114—Onus of proof—Evidence evenly balanced—Onus not discharged —Failure to call material witness—when adverse presumption arises.

At the conclusion of a trial the Judge was unable to say which story he could accept, as such evidence was evenly balanced. He found for the plaintiff on the ground that the defendant's failure to call a material witness who was at the time of the trial in India tilted the scales of probability.

Held, on appeal, that the onus was on the plaintiff to prove his case and that, the position at the conclusion of the trial being exactly even, the plaintiff had not discharged the onus which was on him and his action must fail.

Held also, that, the burden of proof not being on the defendant, his failure to call a material witness would not raise an adverse presumption under Section 114 of the Evidence Enactment.

CIVIL APPEAL.

Shearn for Appellant.

Ramani (*Sen* with him) for Respondent.

Cur. Adv. Vult.

Terrell, Ag. C. J.—The plaintiff (respondent) was a ledger clerk employed by the defendant, and his claim is for the sum of $926 for wages alleged to be due to him for the period of his service. Before Raja Musa J. the plaintiff recovered judgment for the amount claimed, and the defendant has appealed.

The material portions of the plaint are as follows:—

"1. The plaintiff is a "Kanakka Pillay" (ledger clerk) and resides at Kuala Selangor. The defendant is a money lender and also resides at Kuala Selangor.

2. On or about the 12th of June 1935 the defendant engaged the plaintiff as a kanakka pillay *inter alia* on the following terms:—

(a) The plaintiff was to be provided with free board and lodging and clothing; and

(b) a salary of $30 per month.

3. The plaintiff was to work at defendant's Kuala Selangor office and it was agreed that plaintiff's salary was to be kept by defendant on deposit and paid to plaintiff when his services were terminated".

These allegations are met by the following paragraphs in the defence:—

"1. Paragraph 1 of the statement of plaint is admitted.

2. With regard to paragraphs 2 and 3 of the Statement of Plaint, in 1935 one A.L.P.S.T.A.R. Kasi Chettiar of Klang informed the defendant that the plaintiff had no work and wished to gain experience in an office and requested the defendant to take the plaintiff into his office for that purpose which the defendant agreed to do it being agreed that the defendant should provide the plaintiff with free board and lodging and with such clothing as it is usual to give employees in Chettiar firms.

3. Save as is admitted in clause 2 hereof the defendant denies the allegations in paragraphs 2 and 3 of the Statement of Plaint and in particular denies that he at any time agreed to pay the plaintiff a salary".

I have set out the relevant portions of the pleadings as Mr. Ramani (defendant's counsel) largely rested his case on the suggestion that the defence was not a simple traverse of the plaintiff's allegation, but was in fact a confession and avoidance, that the employment being admitted, there was an onus upon the defendant to establish the case which he had set up, and that the learned trial Judge having found that this onus was not discharged by the defendant, the plaintiff was rightly entitled to judgment.

In my opinion this interpretation of the pleadings is not well founded. The question at issue is not whether the plaintiff was employed, but the terms of his employment. 'Confession and avoidance' under the old Common Law rules of pleading, would be a proper description of a defence which admitted that the plaintiff had been employed upon the terms claimed, but alleged that the plaintiff had been paid in full, or signed a release for sufficient consideration. The defence here is something quite different. The terms of employment alleged by the plaintiff are completely traversed, and put in issue in paragraph 3 of the defence. In addition, in paragraph 2, the defendant sets up a story of his own. He has accordingly two alternative answers to the plaintiff's claim. If he can establish his version, that of the plaintiff must necessarily be disbelieved, but his principal defence is that the plaintiff's story is untrue.

The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn round and say that the defendant has not established his. The defendant can say "It is wholly immaterial whether I prove my case or not. You have not proved yours" (see the judgment of the Privy Council in *Raja Chandranath Roy v. Ramjai Mazumdar,* 6 Bengal Law Reports, p.303). These considerations are important in view of the very great importance which the learned Judge attached to the fact that the defendant had not called as his witness one Kasi Chettiar who was in his opinion a necessary witness for the purpose of establishing the defendant's version. I will deal with this part of the case later.

The trial lasted four days, and the evidence was carefully considered and ably reviewed by the learned trial Judge in his written judgment and I do not think it necessary to re-examine it. An appellate Court is never in as good a position to estimate the value of *viva voce* evidence as the Judge who saw and heard the witnesses, and after a careful perusal of the record I am satisfied that the learned Judge's findings are fully justified. These findings are summarised in the following passage at page 42 of the record:—

> "Such is the evidence in this case. I have set it out in detail because, after going through it, and after considering the probabilities, I confess that I am unable to say which story I can accept as being the more probable".

The learned Judge then proceeds to analyse the probabilities of the case as they appealed to him and on page 45 of the record he again summarises his conclusions as follows:—

> "These are the facts and probabilities in this case as I see them. On these facts and probabilities it is impossible for me to make a finding of fact. The evidence pro and con is so evenly balanced. But to a decision in the case I must come and it seems to me that the only manner in which I can come to a conclusion is to decide on the question of onus".

With this conclusion I respectfully agree, and it is only when the learned judge proceeds to deal with the question of onus that I find myself compelled to take a different view. The learned judge approaches the matter in this way. He states, as is certainly the case, that the onus is at the commencement upon the Plaintiff, and that at the close of the case if the Plaintiff's evidence had not been rebutted he would have been entitled to judgment. But then he rules that the onus is shifted on to the defendant, and proceeds to draw an unfavourable inference against the defendant through his failure to call Kasi Chettiar as a witness. In the result he finds that the defendant has not discharged the onus which has shifted to him, and gives judgment in favour of the Plaintiff.

In my opinion this line of reasoning cannot be supported. In a case such as the present the position has been clearly stated in the judgment of Brett M. R. in *Abrath v. North Eastern Railway Co.*, 11 Q.B.D., page 440, at p.452:—

> "But then it is contended (I think fallaciously), that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him".

Applying the principles laid down by the Court of Appeal in the above case, it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a *prima facie* case, but at the conclusion of the trial the learned Judge has found that the position was exactly even, i.e. that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the Court that the plaintiff has not established his case and the learned Judge has so found.

This really disposes of the appeal, and I will only refer shortly to the unfavourable inference which the learned Judge drew from the defendant's failure to call Kasi Chettiar. It is no doubt true as mentioned above that if the defendant had been the claimant, he could not have hoped to satisfy the Court, if he failed to call the witness with whom he alleged that the negotiations on behalf of the plaintiff were conducted. The reason for that would be that the Court is entitled to the best evidence available before it can be called upon for a decision, and if a plaintiff failed to call a material or essential witness it is almost inevitable that his claim would be rejected. But it is a very different thing to suggest that in a case where the *onus probandi* was not on him but on the other side, a failure to call a material witness would result

in the same fatal consequences. As I have pointed out, although the establishment of the defendant's version would necessarily be conclusive against the plaintiff, a failure to establish it is by no means conclusive in the plaintiff's favour. The plaintiff must prove his case and it is sufficient for the defendant if the plaintiff fails to do so.

I would add that I can see little material from which the learned Judge could draw any definite presumption against the defendant. Kasi Chettiar was certainly not available in Malaya, and there were no circumstances from which the Court could infer that he was being kept out of the way because his evidence, if given, would support not the defendant but the plaintiff. It was quite competent for defendant's counsel at the trial to decide that he had enough evidence to defeat the plaintiff's claim without substantially establishing the defendant's version, and the learned Judge has recorded on page 28 of the Record that counsel considered that Kasi Chettiar's evidence was not necessary. The learned Judge's findings justified counsel's estimate of the position. In these circumstances I do not think that any unfavourable presumption can be made under section 114 of the Evidence Enactment owing to Kasi Chettiar's absence.

I would allow the appeal with costs here and below. The deposit should be paid out to the appellant or his solicitors.

McElwaine, C. J.—I have read the judgment of the President of the Court and agree with it, but out of respect for the learned trial judge with whose conclusion we differ I give my reasons in my own words.

The trial judge on the evidence adduced was unable to say which story he could accept.

The plaintiff therefore failed to discharge the onus which was upon him. That onus was to satisfy the Court that his story was probably true. Had the matter rested there the plaintiff's action should, and I think would, have been dismissed.

What, in the opinion of the trial judge, tilted the scale of probability in the plaintiff's favour was the failure of the defendant to call as his witness one Kasi Chettiar who was in India at the date of the trial.

In paragraphs 2 and 3 of the plaint the plaintiff alleged that he was engaged on the terms that he should be provided with free board and lodging and clothing and a salary of $30/- per month, the salary to be kept by the defendant on deposit and paid to the plaintiff when his services were terminated.

It is common ground that these terms were not arranged directly between the plaintiff and the defendant.

In paragraph 2 of the defence the defendant gave his version as to how he came to employ the plaintiff. He pleaded that Kasi Chettiar had requested him to employ the plaintiff and that he agreed to do so in return for free board and lodging and with such clothing as it is usual to give employees in Chettiar firms.

The plaintiff said that the terms of his employment were agreed to by the defendant and the plaintiff's brother Kalamegam who was his principal witness and who deposed to the $30/- per month salary. No one suggested that Kasi Chettiar was present at any interview between Kalamegam and the defendant or could depose to a promise by the defendant to pay $30- per month salary.

The learned judge says "Kasi Chettiar appears to me to be the main hinge in the whole of his (i. e. the defendant's) case. That being so I am entitled to presume, in his absence, that the evidence of Kasi Chettiar would not support the defendant's case but would tend to support that of the plaintiff." This proposition is founded on illustration (g) to section 114 of the Evidence Enactment "The Court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it."

Now, assuming that this witness who was in India could have been called or that his evidence could have been taken on commission the non-production of his evidence can only be presumed to be unfavourable on a point shewn to be within the witness's knowledge. The most that could possibly be presumed from Kasi Chettiar's absence from the witness box is that he would if called have denied that he had asked the defendant to employ the plaintiff on the terms mentioned in paragraph 2 of the Defence. For reasons which I shall presently shew this presumption cannot be drawn. It could not be presumed that Kasi Chettiar would have proved that the defendant promised Kalamegam that he would pay the plaintiff a salary because there is no evidence to indicate that Kasi had any knowledge of any discussion between the defendant and Kalamegam much less that he knew what took place at that discussion.

That was the vital part of the plaintiff's case and before any inference adverse to the defendant can be drawn from the non-production of Kasi it must be shewn that the evidence which Kasi could have given

would have related to what passed between Kalamegam and the defendant and there is no foundation upon which any such presumption can be based.

The only possible bearing Kasi's evidence could have on the plaintiff's case is that if the presumption can be drawn that Kasi would have denied the matters pleaded in paragraph 2 of the Defence and deposed to by the defendant it would so have discredited the defendant that his denial of the interview with Kalamegam would lose heavily when weighed in the scale with the latter's evidence.

But Kasi's absence does not give rise to a presumption that he would have denied the matters in paragraph 2 of the Defence.

In *Public Prosecutor v. Lee Pak,* 6 M.L.J. 265 Whitley Acting C. J. pointed out that the presumption under section 114 illustration (g) cannot properly arise when the evidence which it is sought to contradict by the presumption is not contradicted by any evidence which could have been given. In the present case the evidence for the plaintiff tends to confirm the defendant's evidence that there was an interview between Kasi and the defendant at which the employment of the plaintiff was discussed. The defendant's evidence in chief as to his conversation with Kasi was:—

> "A friend of mine A.L.P.S.T.A.R. Kasi Chettiar, now in India, asked me to give plaintiff employment in my firm. As a result of my conversation with him, I took plaintiff into my employment".

In cross-examination he said "Kasi told me I need not pay any salary".

No attempt was made to contradict the defendant's story of his conversation with Kasi. On the contrary, the plaintiff's witness Kalamegam shews that such a conversation was probable "I had asked Kasi Chettiar the agent of my firm to get the plaintiff who was then in India, a job. Kasi Chettiar told me that defendant was in need of an assistant". Suppiah Chettiar, another witness for the plaintiff, said that he went to the defendant with Kalamegam when the latter asked the defendant whether it was true that he was prepared to engage his brother. Now, this evidence in no way renders it unlikely that Kasi before he told Kalamegam that defendant wanted an assistant had discussed the matter with the defendant.

I am therefore of opinion that a presumption could not properly be drawn that Kasi if called would have discredited the defendant by denying the conversation.

For these reasons I think that a presumption adverse to the defendant should not have been drawn from the non-production of Kasi and as the absence of evidence from Kasi was treated by the learned judge as the determining factor in the case I agree that the appeal should be allowed with the usual consequences.

Gordon-Smith, J.—In this case the learned trial judge at Seremban gave judgment for the Plaintiff-Respondent in the sum of $926.00 being in respect of salary for approximately six months and a further month's salary in lieu of notice.

The Defendant-Appellant appeals to this Court to reverse such decision giving numerous grounds why this should be done. I do not propose to go into all those grounds, but in effect they are that the learned judge erred in law and also misdirected himself in regard to the onus of proof and the value or weight to be attached to various pieces of evidence.

In a considered judgment, in which he carefully analysed at length the evidence given on both sides, the learned judge states "I have set it out in detail because after going through it and after considering the probabilities, I confess that I am unable to say which story I can accept as being the more probable". From a perusal of this evidence one can well understand the dilemma in which the learned judge found himself.

In paragraphs 2 and 3 of his Plaint the Plaintiff alleged that on the 12th June 1935 the Defendant had engaged him as a clerk to work at Defendant's office at Kuala Selangor at a salary of $30.00 p.m. with free board, lodging and clothing but that such salary was to be kept by Defendant on deposit and paid to Plaintiff when his services terminated. In paragraph 5 of the plaint it is alleged that the Defendant without any notice dispensed with the Plaintiff's services and refused to pay the salary due.

In paragraph 2 of the defence the Defendant traverses those allegations as to the conditions of employment and avers that at the request of one Kasi Chettiar, and as the Plaintiff had no work and wished to gain experience, he took the Defendant into his office for that purpose and agreed to provide him with free board, lodging, and the usual clothing.

The allegation in paragraph 5 of the plaint as to dispensing with the Plaintiff's services was wholly denied.

Briefly, these were the main issues at large and on which there is complete conflict of evidence.

After recording the statement which I have quoted the learned judge then discusses the probabilities from the point of view of both sides at some considerable length, but even this further consideration does not enable him to come to any conclusion as he states "On these facts and probabilities it is impossible for me to make any findings of fact. The evidence pro and con is so evenly balanced. But to a decision in the case I must come and it seems to me that the only manner in which I can come to conclusion is to decide on the question of onus". I would pause here to state that up to this point I do not think that any material exception can be taken to the manner in which the learned judge has attempted to shift the evidence or in discussing the probabilities and pros and cons of the case from all angles, in his judgment. He has seen the witnesses and is conversant with the type of evidence that was put before him and one can readily understand his difficulties in coming to conclusions as to the facts.

The learned judge then proceeds "The claim of the plaintiff is based upon a specific contract. He stands or falls by it. The onus in this case, at the commencement, was undoubtedly on the plaintiff. He sought to discharge that onus firstly by means of the presumption I have referred to earlier" (that is that no one can be expected to work for another without remuneration—an admittedly rebuttable presumption) "and secondly by the evidence of Kalamegam and to a minor extent by the evidence of Suppiah Chettiar. As at the close of his case, if this evidence was not rebutted, he would have been entitled to judgment. Putting it in another way, the onus shifted on to the defendant".

It is in these last two sentences that, in my opinion, the learned judge has misdirected himself.

Taking the penultimate sentence first, one must assume that he considered that the *prima facie* case for the Plaintiff which he made out on these three grounds had been rebutted, because otherwise the learned judge would not have found himself in the difficult position he did and to which he has twice specifically referred, i. e. being unable to come to any conclusion on the facts. One might easily contend also on the evidence, not only that for the defence but for the Plaintiff as well, that the presumption as to working without remuneration had been rebutted. Similarly also the evidence of Kalamegam and Suppiah Chettiar was not at all impressive.

Having been rebutted, how and why does the onus shift on to the Defendant?

In this connection I would quote from several cases which were dealt with in argument by both sides before us which seem to me to be extremely relevant and applicable in regard to this question of onus.

Hirschhorn v. Evans, 1938 Vol. 3 A.E.R. Greer, L. J. said at p. 491:—

> "The fact that one does not believe evidence given for the Defendant cannot make evidence for the Plaintiff in any case".

Yellappa & ors. v. Tippanna, 56 I.A. 13. Lord Shaw at p.18:—

> "In any case *onus probandi* applies to a situation in which the mind of the judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time".

Sime, Darby & Co. v. Official Assignee, 1928 A.I.R. P.C. 77. Warrington, L. J.:—

> "The question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it".

Abrath v. North Eastern Railway Co., 1883 Q.B.D. 452. Brett M. R.:—

> "But then it is contended (I think fallaciously) that if the Plaintiff has given *prima facie* evidence, which, unless it be answered will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself".

At page 452 the Master of the Rolls having previously expressed admiration of the lucid and clear way in which the trial Judge had summed up the position to the Jury continued and said that the effect of the summing up as to this point might be stated as follows:—

> "Take the evidence before you; if your minds are made up one way or the other, there will be no difficulty; but if after consideration you remain in doubt how the questions which I put to you ought to be answered, I tell you that the burden of proof lies upon the plaintiff, and if either the plaintiff's evidence or the defendant's evidence added to the plaintiff's, has really left you in doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him".

Robins v. National Trust Co., 1927 A. C. Lord Dunedin at page 520:—

> "Onus is always on a person who asserts a proposition or fact which is not self evident . . . . But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter".

It seems to me that the extracts from the last two cases which I have quoted are particularly and extremely apposite to the position in which the learned Judge found himself and, in effect, resolve the matter.

This, however, does not quite conclude the matter. The learned Judge appears to think that the failure of the Defendant to produce Kasi Chettiar to give evidence has, in effect, weighed down the scales sufficiently to enable him to give a decision in favour of the Plaintiff. Kasi Chettiar was, according to the defence, (paragraph 2), the person who was responsible for the introduction of the Plaintiff to the Defendant and the person who requested the Defendant to give employment to the Plaintiff. Kasi Chettiar was, admittedly, in India at the time of the trial, and I do not think that it can be said that he is proved to have been available. The learned Judge stated "For the purposes of the Defendant, in view of the state of the evidence, Kasi Chettiar appears to me to be the main hinge in the whole of his case. That being so I am entitled to presume, in his absence, that the evidence of Kasi Chettiar would not support the defendant's case but would tend to support that of the plaintiff. The defendant, to put it another way, has not discharged the onus thrown upon him . . . . . "

In the first place there is nothing in the plaint or in any of the prior correspondence which might suggest to the defence that it is Kalamegam the brother of the Plaintiff who is going to prove the terms of the employment, whereas the defence alleges that it is Kasi Chettiar who was responsible for such employment. However mistaken it might have been on tactical grounds not to apply for an adjournment in order to obtain the evidence of Kasi Chettiar, when confronted with that of Kalamegam, I think that the learned judge is in error in stating that, from his absence, he is entitled to presume that his evidence would tend to support that of the Plaintiff (and of course that of his brother Kalamegam). As it is, it appears as if it was this fact that, in the opinion of the learned judge, just sufficiently weighed down the scales in favour of the Plaintiff for him to give judgment in the Plaintiff's favour. In my opinion and with the greatest respect I think that the learned judge was in error in making this presumption as to Kasi Chettiar's absence and also in saying that the defendant had not discharged the onus thrown upon him. In my opinion there was no onus thrown on the defendant, and this onus remained on the Plaintiff to prove the specific terms of his contract, which he failed to do.

For these reasons I think that the appeal should be allowed with costs both here and in the Court below.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., McELWAINE, C.J. (S.S.)

AND GORDON-SMITH, J.

November 23, 1938.

RAMAN CHETTIAR

v.

LEDCHUMANAN CHETTIAR.

(NEGRI SEMBILAN CIVIL APPEAL No. 3 of 1938)

Bankruptcy Enactment (Cap. 55) Ss. 4 (1) (ii), 123—Bankruptcy Rules Nos. 91, 285—Bankruptcy Notice—non-production of office copy of judgment on issue of—claim for judgment debt, costs and interest up to certain date—validity of notice.

A bankruptcy notice founded upon a judgment which ordered payment of $2,971.81 with interest thereon at 5% per annum from a specified date until the date of realisation and costs was issued upon a written request sent by post to the Assistant Registrar of the Supreme Court at Seremban. No office copy of the judgment accompanied the request. The debtor applied to the Court at Seremban to set aside the notice on the ground that the office copy of the judgment was not produced to the Assistant Registrar of the Court when the notice was issued. The learned Judge dismissed the application. The debtor appealed to the Court of Appeal.

Held, by the Court of Appeal (Terrell, Ag. C.J. and Gordon-Smith, J., McElwaine, C.J. (S.S.) dissenting) allowing the appeal that the omission to produce the office copy of the Judgment when the request for issue of the bankruptcy notice was made was a defect which could not be cured by Section 123 of the Bankruptcy Enactment or Rule 91 of the Bankruptcy Rules.

In re Sithamparam Chettiar, (1933—1934) F.M.S.L.R. 332; (1935) 4 M.L.J. 38 not followed.

Held also, that, provided that it claimed the whole of the judgment debt and costs, the notice was not invalid by reason merely of the fact that it required in addition payment of interest at the rate mentioned in the judgment up to a certain date.

In re H. B., (1904) 1 K.B. 94 distinguished.

CIVIL APPEAL.

Joaquim (*Cumarasami* with him) for the appellant.

O'Reilly for the respondent.